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Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

—v.—

QUINCY CABLE TV, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI

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The City of New York ("the City") files this brief, as *amicus curiae*, in support of the petitioners' prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered herein on July 19, 1985 (768 F.2d 1434).

This brief is filed in accordance with Rule 36.4 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The City has been involved in franchising and regulating cable television systems since 1964. The City presently has in place ten franchises for cable television systems, covering all areas within the five Boroughs of the City, which have the

potential of serving over two million households. The City is a franchising authority within the meaning of Section 602(9) of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.* ("the Cable Act"), and actively participated in the development of that legislation.[1]

The City is concerned that, if permitted to stand, the Court of Appeals opinion will upset the delicate balance between federal and local regulation of cable television systems that was achieved in the Cable Act; will leave the law concerning the scope of enforceable service requirements in cable franchises in a state of confusion and disarray; and will impede or prevent franchising authorities from accomplishing fundamental regulatory objectives with regard to cable television. For the reasons stated *infra*, the City respectfully submits that the decision of the Court of Appeals below was incorrect as a matter of law and, if permitted to stand, will substantially impair the ability of local governments (1) to condition cable television franchises upon the requirement that cable systems carry local broadcast television signals on a nondiscriminatory basis; and (2) to enforce other requirements regarding cable services in the public interest.

SUMMARY OF ARGUMENT

For some twenty years prior to the Court of Appeals decision below, the Federal Communications Commission ("FCC") required, by virtue of its "must-carry" rules (47 C.F.R. §§ 76.57-61 (1984)), that cable system operators carry the signals of local television broadcast stations. Irrespective of considerations of competitive parity among broadcasters, the must-carry rules had the purpose and effect of ensuring that cable subscribers had ready access to local television stations licensed to serve them.

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1 The City is also a licensee of a public television station (WNYC).

Throughout this twenty-year period, the City, as well as thousands of other local governments throughout the United States, granted cable franchises with the expectation that—in addition to whatever other programming services such systems might carry—they would, at a minimum, facilitate subscribers' reception of all local broadcast stations, on a nondiscriminatory basis. Cable system operators regularly accepted franchises with this understanding. When, in 1984, Congress enacted the Cable Act to establish a national policy clarifying the existing system of local, state and federal regulation of cable television, the continued existence of the FCC's must-carry rules constituted an important centerpiece around which the regulatory scheme was crafted.

In its decision below, however, the Court of Appeals invalidated the FCC's must-carry rules, on the ground that the rules impinged upon the editorial discretion of cable system operators in violation of the First Amendment—primarily because, in the judgment of the Court of Appeals, the need for the rules was based on the agency's "speculation," "unsubstantiated intuition," and "collective instinct," rather than on an adequate empirical investigation. The City submits that the decision of the Court of Appeals merits plenary review by this Court for the following reasons:

First, since it is based firmly on constitutional grounds, the decision below places a cloud over the power of local cable franchising authorities, such as the City, to require or enforce provisions similar to the FCC's must-carry rules in cable franchises, or to agree upon enforceable franchise provisions with respect to other kinds of programming services in the public interest. The uncertainty created by the decision is particularly ironic and destructive, coming as it does less than a year after enactment of comprehensive federal cable legislation that was intended finally to resolve the scope of permissible regulation of cable after years of disagreement and inconclusive litigation.

Second, the decision involves an important issue of constitutional law that should be resolved by this Court. In deciding that, for First Amendment purposes, cable television is indistinguishable from traditional print media, the court below applied an improper and unworkable First Amendment analysis. Moreover, the decision is in direct conflict with the decision of at least one other Circuit, and, the City submits, is inconsistent with the results reached in prior decisions of this Court and numerous decisions of other lower federal courts.

Third, the Court below should not have purported to resolve definitively the ultimate substantive constitutional issues on the basis of the record before it. By ignoring the less drastic alternatives for dealing with the deficiencies it perceived in the factual predicate for the FCC's must-carry rules, the Court of Appeals has unnecessarily cast the law of cable regulation into disarray.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW WILL PRECIPITATE RECURRING DISPUTES CONCERNING THE POWER OF LOCAL FRANCHISING AUTHORITIES TO REGULATE CABLE TELEVISION SYSTEMS PURSUANT TO THE CABLE COMMUNICATIONS POLICY ACT OF 1984

In 1984, many years after the need for comprehensive federal cable legislation was first observed by this Court,[2] and after extensive discussions and compromises by representatives of the cable industry and local governments, Congress enacted the Cable Act. A principal purpose of this legislation was to establish, for the first time, "a national policy that clarifies the current system of local, state and Federal regulation of cable television." Report of the Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2d Sess. 19 (1984)

2 *See United States* v. *Midwest Video Corp.*, 406 U.S. 649, 676 (1972) (Burger, C.J., concurring).

("Committee Report"). In doing so, Congress intended to establish a policy that would continue to rely "on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process." *Id.* Specifically, Congress intended that the Cable Act would "preserve the critical role of municipal governments in the franchise process." *Id.*

The decision below—which fails even to acknowledge the existence of the Cable Act—is likely to undercut the statutory role for local franchising authorities established by Congress, and will have significant adverse effects on the efforts of franchising authorities to regulate the services provided on cable systems in the public interest.

Conventional wisdom holds that, "[b]ecause of . . . start-up costs and the nature of the cable television market . . . , cable systems have operated largely free from competition." *Berkshire Cablevision of Rhode Island, Inc.* v. *Burke*, 571 F. Supp. 976, 986 (D.R.I. 1983), *appeal dismissed as moot*, No. 83-1800 (1st Cir. Sept. 24, 1985). While the cause of this situation may be disputed, the key operative fact is not: without question, the vast majority of cable television systems in the United States—indeed, all but a handful—face no competition for subscribers from other cable television systems.[3] As a result, aspects of the services rendered by these local monopolies have traditionally been subject to regulation by local governments. In exchange for granting permission to use public streets to construct a cable system, many franchising authorities, including the City, have long sought to condition the granting of such permission upon the cable operator's promise to carry certain minimum programming services.

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3 Nor do alternative technologies provide effective competition for cable systems; the "industry consensus" appears to be that such technologies "are no match for cable systems being introduced in the same urban markets." Arthur D. Little, Inc., *Prosperity for Cable TV: Outlook 1985-1990—Report to National Cable Television Association* 19 (1985).

Congress expressly recognized and approved this practice in the Cable Act. For example, Section 624(b)(2)(B) of the Cable Act authorizes the enforcement of franchise requirements "for broad categories of video programming or other services."[4] Section 611 of the Cable Act permits the establishment of requirements in a cable franchise with respect to channel capacity for public, educational or governmental use. Section 612 requires, independent of the requirements in any local franchise, that cable systems with at least thirty-six channels designate that a specified percentage of such channels (depending upon the size of the system) be available for commercial leasing by unaffiliated persons. In Section 624(f)(2), Congress also sought to preserve existing FCC regulations regarding the content of cable services (including the must-carry rules which the Court of Appeals has now invalidated).

All of these provisions, taken together, reflect an attempt by Congress to balance the cable operator's interest in selecting its own programming against both the federal and local interest in ensuring that cable systems, which are *de facto* monopolies, meet certain minimum service requirements and make available some reasonable portion of their channel capacity for use by First Amendment speakers other than the franchised cable operator alone. Congress did not want or intend monopoly cable operators to function as the sole arbiters of the programming that will or will not be available in cable markets.

The decision below, however, will obstruct operation of the regulatory scheme contemplated by Congress in several ways.

First, since the decision is firmly premised upon constitutional grounds, it is likely to encourage challenges to the constitutionality of requirements in franchise agreements, such as those in effect in the City, which require cable operators, as a contractual matter, to carry the very same signals mandated

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4 In the case of franchises which precede the effective date of the Cable Act, such as the City's franchises, Section 624(c) authorizes the enforcement of *any* service requirements in a franchise.

by the FCC rules which the Court of Appeals below has now struck down as unconstitutional.

Modern cable television systems are capable of accomplishing many communications objectives. But their original function was, and a fundamental purpose remains, to facilitate the reception of local broadcast television signals. In many parts of the City, for example, and particularly in the Borough of Manhattan—where cable franchises were first granted by the City in 1970—broadcast television reception is often of poor and frequently unviewable quality because of the "ghosting" effect resulting from tall buildings.

Indeed, the City first granted cable franchises for Manhattan primarily to facilitate the clear reception of local broadcast television signals. Nevertheless, the decision below might well be invoked by a cable operator as grounds for ignoring its contractual commitment and ceasing to carry local broadcast television signals or (more likely) deciding to favor the signals of some local stations over others. For example, one franchised cable operator in Manhattan has already dropped the signal of a local public television station, presumably in reliance upon the decision below.[5]

The decision below also places local governments in a quandary as to how responsibly to discharge their roles under the Cable Act. For example, does the First Amendment demand that franchising authorities develop empirical evidence for particular franchise requirements, such as those mandating nondiscriminatory carriage of local broadcast television stations, or does that limitation apply only to the FCC?

Second, the decision below upsets the balance that Congress struck between federal and local regulation of cable services. In new franchises and renewals of existing franchises, Section 624(b)(2)(B) of the Cable Act limits the enforceability of

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5 *See* Multichannel News, Oct. 7, 1985, at 1, col. 3.

franchise requirements to merely "broad categories" of video programming; local franchising authorities may not seek or enforce requirements in such franchises for specific programming services. In so limiting the authority of *local* governments, Congress at the same time expressly grandfathered the FCC's must-carry rules in Section 624(f) of the Cable Act.[6] In the absence of the FCC's must-carry rules, however, it now may be disputed whether a reasonable definition of local broadcast signals constitutes one of the "broad categories" of video programming that, consistent with the statute, a franchising authority may enforce in a cable franchise.

The decision below is therefore likely to impede the efforts of local franchising authorities to require, through provisions in their franchises, the carriage of local broadcast television signals. Congress anticipated that this fundamental goal of national cable policy would be achieved, instead, by retaining the FCC's existing rules.

Third, if the Court of Appeals' determination that the must-carry rules unconstitutionally infringe upon the editorial discretion of the cable operators is permitted to stand, it is likely to encourage cable operators to challenge, on similar grounds, the constitutionality of both public, educational and governmental access channel requirements in cable franchises that are authorized by Section 611 of the Cable Act and the commercial leased channel requirements imposed directly by Section 612.

In enacting the Cable Act, Congress carefully considered the First Amendment implications and adopted an approach that Congress believed would secure "the First Amendment right of

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6 Section 624(f) grandfathers FCC regulations as in effect on September 21, 1983, and as subsequently amended in a manner consistent with the provisions of the Cable Act. The legislation history clearly reflects that the rules which Congress sought to preserve in the Cable Act expressly included those which the Court of Appeals has now struck down: "Regulations which relate to the content of cable service and which remain in effect include the FCC's must-carry requirements (47 CFR 76.51 *et seq.*)." Committee Report at 70.

the viewers and listeners to a diversity of information sources, in the manner least restrictive on the cable operators' First Amendment interests." Committee Report at 36. Relying expressly upon the unanimous decision of this Court in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), which upheld FCC rules that prevented a local daily newspaper from owning broadcast properties in the community in which it published, Congress reasoned that, *a fortiori*, the provisions of the Cable Act should pass constitutional muster:

> "In effect, [the FCC's] rules completely bar newspapers and cable systems from speaking through the broadcast medium in the communities they serve. If these are permissible, then surely a less restrictive regulation that does not absolutely ban speech through the cable medium, but requires only some limited sharing of bottleneck facilities on a content-neutral basis, is also valid." Committee Report at 33.

Hence, Congress drafted into the Cable Act provisions which it intended to strike a balance among the First Amendment interests of subscribers, cable operators and cable programmers in a manner which involves a minimum of content regulation and recognizes the special status of cable operators as users of a scarce public resource (*i.e.*, the public rights-of-way). The decision below, however, if permitted to stand, will cast a dark shadow of uncertainty over this delicate legislative compromise.[7]

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7 Experience prior to enactment of the Cable Act suggests that the threat of disruptive litigation to test the validity of various aspects of cable regulation, in light of the decision below, is far from illusory. For example, in enacting comprehensive federal cable legislation, Congress expressly observed that, prior thereto, "[m]unicipal authority to franchise and regulate cable television systems [had] been under an increasing number of challenges on three fronts: in the courts, at the Federal Communications Commission, and at the state public utility commissions." Commitee Report at 19.

II. THE LOWER COURT'S RULING INVOLVES AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW THAT SHOULD BE RESOLVED BY THIS COURT

The Court of Appeals below premised its decision upon its erroneous conclusion that, for First Amendment purposes, cable is indistinguishable from traditional print media. In this respect, while acknowledging this Court's admonition that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them,"[8] the Court of Appeals found that the "scarcity rationale" has no place in evaluating government regulation of cable television.

Thus, the Court of Appeals rejected arguments that either the fact that cable operators require use of public rights-of-way or the natural monopoly characteristics of cable should influence the nature of the proper First Amendment analysis. By implication, the court below likewise rejected the recent judgment of Congress, in enacting the Cable Act, that appropriate regulation of cable "can enhance speech and promote the goals of the First Amendment." Committee Report at 31. Instead, preferring to ignore the reality of cable markets as they exist in fact and a long line of cases which recognize the justifications for different treatment,[9] the Court of Appeals chose to proceed on the theoretical assumption that, for First Amendment purposes, "there is no meaningful distinction between cable television and newspapers.' " 768 F.2d at 1450.

But to conclude, as did the court below, that cable systems are not necessarily *identical* to broadcasters does not mean that

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8 *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386 (1969).

9 *See, e.g., Berkshire Cablevision of Rhode Island, Inc.* v. *Burke*, 571 F. Supp. 976 (D.R.I. 1983), *appeal dismissed as moot*, No. 83-1800 (1st Cir. Sept. 24, 1985); *Community Communications Co.* v. *City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Hopkinsville Cable TV, Inc.* v. *Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982).

they are identical to newspapers. In fact, cable systems possess a multifaceted character—combining elements of common carriers, utilities and broadcasters, as well as publishers—which demands its own careful First Amendment analysis.

The decision of the court below to subject cable television to precisely the same First Amendment test as the print media, the City suggests, is unrealistic. The decision represents an erroneous new approach which will hinder, rather than further, the development of appropriate First Amendment standards for cable to achieve the ultimate First Amendment goal of encouraging cable systems to contribute to "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). Reasonable requirements that franchised cable systems provide minimum categories of programming services do not violate the First Amendment; on the contrary, such requirements advance the public's First Amendment interest in receiving a diversity of programming.

By invalidating the must-carry rules, on its novel theory, the Court of Appeals has also declared invalid rules which this Court held, just over a year ago, to serve an "important and substantial federal interest" sufficient to justify preemption of any conflicting state regulation. *Capital Cities Cable, Inc.* v. *Crisp*, ____ U.S. ____, 104 S. Ct. 2694 (1984). The decision also directly contradicts the holding of the United States Court of Appeals for the Eighth Circuit in *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65, 69 (8th Cir. 1968) that the must-carry rules satisfy the applicable First Amendment standards.

III. THE COURT BELOW SHOULD NOT HAVE RESOLVED THE ULTIMATE SUBSTANTIVE CONSTITUTIONAL ISSUES ON THE RECORD BEFORE IT

The court below purported not to determine whether "any" version of the mandatory carriage rules would contravene the First Amendment, and suggested that the rules may have been permissible at the time they were drafted, but became unconstitutional only at some unspecified point in the interim when the FCC's "collective instinct" was no longer adequate to suffice for what the Court of Appeals believed to be the agency's obligation to "get the facts" to substantiate its rules in a more objective, empirically verifiable manner.

The Court of Appeals decision may articulate instructive principles of administrative law. *Cf. Coal Exporters Association of the United States, Inc.* v. *United States*, 745 F.2d 76 (D.C. Cir. 1984). But the issue of whether the FCC drew supportable inferences from, and took sustainable actions based upon, the evidence before it need not and should not have been elevated to the level of a First Amendment question. The Court of Appeals failed to heed the fundamental rule that constitutional questions should not be anticipated prematurely, and should be avoided if there exists an alternative ground upon which a case might be decided. *See, e.g., Ashwander* v. *TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). A major premise of the Court of Appeals' far-ranging, constitutional analysis—that the FCC's rules were not adequately supported by the factual record—provided such an alternative and more limited basis for decision which the court below chose not to address.

Moreover, the record below afforded an extremely unsatisfactory basis for promulgating broad First Amendment principles of general applicability. Instead of directing the FCC to revisit the need for the existing must-carry rules, the court below in effect conducted its own rulemaking proceeding, and resolved various disputed issues in the process. Thus, for

example, the Court of Appeals made definitive and, the City believes, erroneous findings with respect to the ease with which broadcast television stations may bypass cable systems altogether in order to deliver their signals where cable systems exist, and with respect to whether cable systems tend to be natural monopolies.

Appellate courts are not well equipped to adjudicate complex, technical questions of fact in the first instance. Nevertheless, the court below apparently felt constrained to resolve disputed factual issues—and hence to prejudice their potential adjudication in other forums. Moreover, the Court of Appeals seems to have been oblivious that Congress, in enacting comprehensive federal cable legislation in 1984, so recently resolved many of these factual issues in a different manner.

The approach taken by the Court of Appeals creates a significant risk of serious judicial error and raises important issues concerning the scope of judicial review that warrant examination by this Court. If the court below was dissatisfied with the factual basis that appeared in the record for the FCC's must-carry rules, it should have required the agency to conduct further rulemaking proceedings with respect thereto. It should not have reached out to resolve complex factual issues in a manner adverse to the validity of rules which constituted the foundation for cable regulation for two decades. In so doing, the Court of Appeals has rendered a decision which merits this Court's plenary review before it spawns further judicial error and years of unnecessary litigation in regard to the important questions involved.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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